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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VERNE RAYMOND ORLOP, JR.,

Defendant and Appellant.

D075133

(Super. Ct. No. INF1500310)

APPEAL from a judgment of the Superior Court of Riverside County, James Stafford Hawkins Jr., Judge. Affirmed with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Verne Raymond Orlop, Jr., guilty of premeditated and deliberate first degree murder, rejecting Orlop's defenses of self-defense and imperfect self-defense.

Orlop argues on appeal that his rights were prejudicially violated because the trial court did not sua sponte provide an instruction on voluntary manslaughter based on sudden quarrel or heat of passion. The court had no obligation to instruct on this theory because there is no evidence that Orlop acted in the heat of passion. We find no error and affirm the judgment.

BACKGROUND

Procedural Background

On August 15, 2017, a jury convicted Orlop of first degree murder and found true an allegation that Orlop personally used a deadly weapon, a knife. (Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1).)¹ Orlop waived his right to a jury trial on prior conviction allegations. The court found true the allegations that Orlop had a prior strike conviction (§§ 667, subds. (c) and (e)(1), 1170.12 subd. (c)(1)), that was also a prior serious felony offense (§ 667 subd. (a)), and a prior prison offense (§ 667.5, subd. (b)). The court sentenced Orlop on October 13, 2017, to a determinate term of six years followed by an indeterminate term of 50 years to life. Orlop filed a timely notice of appeal.

Factual Background

Orlop and Deneé Salisbury, both homeless, lived in the Palm Springs area. They had a contentious relationship. Salisbury was known to be loud and verbally aggressive. A former boyfriend said that Salisbury was sometimes violent when drunk, and that she had smashed a rock on his head. She was also known to fight with another homeless

¹ Further references are to the Penal Code unless otherwise specified.

woman. Orlop testified that Salisbury, armed with a knife, had threatened to kill him and his girlfriend Julia D. many times. He also accused her of stealing clothing and money from Julia and of being violent toward others.

Orlop could also be verbally abusive and had made threats to kill Salisbury and others. In 2011, Orlop was in a bar, "ranting and raving," threatening to kill a man with a hunting knife. He told the victim that he would cut the man's heart out. Orlop told a police officer that he was trying to stab and kill others. Orlop minimized his actions at trial but acknowledged that he pleaded guilty to a felony as a result of this attack in a bar.

On February 6, 2015, about two weeks before the murder, Orlop called 911 complaining that Salisbury had been threatening to kill him and Julia. He threatened to kill Salisbury if the authorities did not remove her.

A police officer contacted Orlop a few weeks later, on February 19, because Orlop and Julia refused to leave a bank. Orlop had a sheathed knife, a pocket knife, and a 20-inch wire garrote. He told the officer that he had the garrote "[t]o kill quickly and quietly." The officer took the garrote but left the knives with Orlop.

An officer saw Salisbury outside a restaurant on South Palm Canyon Drive in the early evening of February 21, 2015. Salisbury was agitated and yelling. She was responsive to the officer, however, and did not appear to be intoxicated. As the officer was talking with her, Orlop walked up to within 30 to 40 feet of the officer and Salisbury. Orlop was yelling and shouting. The officer could not hear what he was complaining about, but asked Orlop to walk away, which he did.

Orlop testified that he walked up to the officer and asked that he arrest Salisbury because she was stalking him and his girlfriend and threatening to kill them both. The officer told Orlop that Salisbury was "a little crazy" and left without talking with Orlop or acknowledging his request to arrest Salisbury.

Near the restaurant, along South Palm Canyon Drive, were an abandoned car dealership and an abandoned bar. The desert stretched to the north and west from these empty buildings. Many transients, including Orlop and Julia, regularly camped in that desert area. After seeing Salisbury nearby, Orlop took Julia to a temporary camp hidden in the bushes nearby instead of returning to his regular camp, because he feared that Salisbury would hurt Julia.

Orlop went back to the restaurant 30 to 45 minutes later. He claimed that on the way back, he heard Salisbury say that Orlop and Julia were "dead" because Orlop had complained to the police about her. A female friend of Salisbury's bought some food for him and Julia. The friend said Orlop appeared to be neither intoxicated nor mentally ill. Orlop went back to his campsite with the food. The woman then went to talk with Salisbury, who was still in front of the restaurant, and bought her some food. Salisbury was calm and did not appear to be drunk. She declined her friend's offer to drive her to a shelter.

Orlop testified that he heard Salisbury on the road, coming toward his temporary campsite hidden in the desert brush. She was yelling that she was going to kill Orlop and Julia. Orlop left his camp and walked toward Salisbury to confront her. Salisbury started down the trail toward Orlop's temporary camp, then turned away and walked on the path

alongside the abandoned dealership toward the desert area where Orlop and Julia regularly camped. Orlop chased after Salisbury after she turned away. He said, "I was racing to catch up to her to confront her." He had his knife in his back pocket.

Orlop walked up to Salisbury from behind, passed her, and stopped when he was 15 to 20 feet in front of her. Orlop told Salisbury to leave him and Julia alone. Salisbury "went insane" according to Orlop and threatened to kill him and Julia. Orlop said Salisbury put her hand in her bag and pulled it out. He thought she had something in her hand, but could not see what. Orlop testified that Salisbury quickly walked up to him and said that she was going to kill him and Julia, so he "just reached up and . . . stabbed her." He testified that he pulled the knife out of her and tried to leave but Salisbury came up to him again and repeated that she would kill Julia. Orlop testified that Salisbury fell or ran into his knife such that she was stabbed in her neck. He claimed he was afraid that he and/or Julia would be killed when he stabbed Salisbury.

Orlop went back to his temporary camp and washed the blood from his arm and his knife. He hid the knife under a rock. He did not call for help for Salisbury, but said that he heard other people walking up to her and assumed they would call 911. Orlop took sleeping pills to fall asleep. He testified he had every right to defend his life. He felt redemption, not remorse, after killing Salisbury.

Officers found Salisbury's body at about 8:10 p.m. that night, on the path leading to the transient camps. Salisbury was lying face down in a large pool of blood around her head and neck. A bag of her belongings was on her arm. Salisbury had a stab wound to the right side of her neck and a stab wound to the right upper part of her chest. Both cuts

were deeper than they were wide. The stab to her neck cut her jugular vein. It went two and a half inches deep, all the way to her spine. The wound just above her right breast went about three inches deep, cutting through her lung and through her aorta. Either stab wound would have been fatal by itself. Salisbury had no defensive wounds on her hands or arms. She was intoxicated, with a blood alcohol level of 0.25 percent.

The next morning, a volunteer officer stopped Orlop near the murder site and talked with him. Orlop rambled on but did not appear to be intoxicated or mentally ill. Orlop was cooperative. He agreed to wait to speak with a detective. Orlop permitted the volunteer to search him and take a folding knife from his pocket. Orlop knew that Salisbury had been stabbed. Orlop told the volunteer that Salisbury was "out of control" and that, "It was justified." Another officer arrived and questioned Orlop. This second officer also saw no signs of intoxication or mental illness. Orlop did not tell either officer that Salisbury had any weapons or attempted to assault him. Orlop said that he confronted Salisbury when she was alone because he did not want anyone else to be exposed to her evil.

Detective Kyle Stjerne arrived and interviewed Orlop. Orlop told the officer, "I'm justified. . . . [¶] "I'm—I couldn't put up with it anymore." He said, "I walked right up towards [Salisbury] and she started threatening me again and then that was it. . . . I justifiably took her life" "I—I made sure no one was around when I took care of it." "[W]ell she started walkin' down the trail. So I come up, walked up past her That's when I got my knife and I opened it and I stood right in front of her and then she started, you know, saying she was gonna kill me. And I just [¶] . . . [¶] I killed her. [¶] . . . [¶]

With my knife. [¶] . . . [¶] I took my knife, I put it this way and I went and she started again so I stabbed her in the heart to make sure I had a kill but I hit a double tap. So I stuck it in her throat and went like that she went to the ground. . . ." After killing her, Orlop washed his hands, wiped the knife, and hid it under a rock. Orlop told the officers he had not used "speed" (i.e., methamphetamine) for two or three days.

DISCUSSION

Instruction on a Lesser Included Offense

Orlop's defense was that he was justified in killing Salisbury because he believed that she posed an immediate risk to his life or to Julia's life. The trial court instructed the jury on lawful self-defense and imperfect self-defense, as well as on first and second degree murder. As noted above, the jury found Orlop guilty of premeditated and deliberate first degree murder, rejecting Orlop's claim of perfect or imperfect self-defense. Orlop now contends that the trial court erred in failing to instruct the jury on voluntary manslaughter due to heat of passion.

The trial court has a duty to instruct the jury on all lesser included offenses, even in the absence of a request, if there is substantial evidence from which a jury can reasonably conclude the defendant committed the lesser offense, but not the greater. (*People v. Breverman* (1998) 19 Cal.4th 142, 153.) "[T]he existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury." (*Id.* at p. 162.) Substantial evidence is evidence that a reasonable jury could find persuasive and, based

thereon, find the lesser, but not the greater, offense was committed. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) The reason for this instructional requirement is to " 'prevent[] either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other.' " (*People v. Smith* (2013) 57 Cal.4th 232, 239.) Orlop did not face an all-or-nothing choice because the trial court gave the jury choices ranging from justified homicide to first degree murder. On appeal, we independently review the claim of failure to instruct on a lesser included offense, considering the evidence in the light most favorable to the defense. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter, which is thus a lesser included offense of murder. (§ 192.) Two mental states can preclude the formation of malice sufficient to reduce an intentional killing to manslaughter: imperfect self-defense—the subjective but objectively unreasonable belief in the need to defend oneself—and heat of passion. (*In re Christian S.* (1994) 7 Cal.4th 768, 778–780 [imperfect self-defense]; *People v. Beltran* (2013) 56 Cal.4th 935, 942 & fn. 3 (*Beltran*) [heat of passion].) "Heat of passion . . . is a state of mind . . . that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation." (*Beltran*, at p. 942.) If the defendant is subjectively so provoked that he acts rashly and without deliberation, from passion rather than from judgment, but his response is not objectively reasonable, the crime is reduced from first degree to second degree murder. The crime is further reduced to voluntary

manslaughter if the defendant acted subjectively in the heat of passion and also, objectively, a person of average disposition would have similarly reacted rashly and without due deliberation, from passion rather than from judgment. (*People v. Jones* (2014) 223 Cal.App.4th 995, 1000–1001.) In both cases, "[T]he accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation." (*People v. Moye* (2009) 47 Cal.4th 537, 550 (*Moye*).) "The proper focus is placed on the defendant's state of mind, not on his [or her] particular act." (*Beltran*, at p. 949.)

Here, we need not examine the evidence to determine if a reasonable person would have reacted rashly to Salisbury because there is no evidence that Orlop subjectively acted rashly or without due deliberation and from passion rather than judgment. We look at the evidence most favorable to Orlop: his own description of his state of mind. Orlop testified and never described his judgment or reason as obscured by passion, fear or other strong emotion. To the contrary, he described his thinking process and actions calmly and in detail. He repeatedly said that he was justified in killing Salisbury to save himself and Julia. In Orlop's own words, he acted deliberately and rationally in stabbing Salisbury. (Cf. *Moye, supra*, 47 Cal.4th at p. 554 [defendant who described each attack on victim as justified did not act in heat of passion].)

Orlop testified that he followed Salisbury to confront her and "[j]ust to stop her." He said he did not want to kill her, but he had his knife with him. He was afraid of her and "couldn't take another attack." Orlop clearly remembered all the details of the encounter—Salisbury's mistaking him for another as he walked up to her, his act of

walking past her then turning to confront her, his stabbing of her as she approached him. (Cf. *Moye*, *supra*, 47 Cal.4th at p. 554 [no evidence of heat of passion of defendant who gave "blow-by-blow recounting of events"].) Further, Orlop testified that he was "very tired," "falling asleep," "fighting to stay awake." Intense and high-wrought emotions usually excite a burst of adrenaline that is inconsistent with being sleepy and fighting to stay awake. Drowsiness generally spills over to one's emotions, dampening them. It is inconsistent with an intense and over-wrought state of mind. Also, Orlop acted rationally and concealed evidence of his guilt immediately after the murder. When he returned to his temporary camp, he cleaned off his arm and clothes, and cleaned and hid his knife.

Orlop patiently waited for the police the next morning and told them that he killed Salisbury reasonably and justifiably because of her prior threats. He did not express any strong emotion clouding his judgment, but rather a conscious determination to take the law into his own hands. At no time did he express shock, surprise, or remorse at what he had done. To the contrary, he felt redemption, not remorse, after killing Salisbury.

On appeal, Orlop has shaded his testimony in favor of a reading that his emotions were highly wrought and that his judgment was obscured by his strong passion. His testimony, fairly read, cannot be twisted into a showing of rash, emotional reaction. Orlop said he was justified in killing Salisbury to protect himself and Julia. The jury did not accept Orlop's defense of self-defense, and we cannot twist his words into a different mental state.

In contrast to the lack of evidence of obscured reason or judgment, evidence of premeditation and deliberation was strong. Orlop threatened to kill Salisbury before

finally doing so. On the night of the murder, Orlop armed himself with a knife and raced to confront Salisbury after she had turned away from the path to the temporary camp where he and Julia were hiding. He said he "made sure no one was around when I took care of it." On the day after the murder, Orlop told an officer that he stabbed Salisbury "in the heart to make sure I had a kill but I hit a double tap. So I stuck it in her throat and went like that and she went to the ground. I told her . . . 'You fuckin' bitch.' I says, 'I told you to stay away from my girl. You pay. . . . You're dead.' " He attacked Salisbury when she was alone in a dark place, left her dead or dying for others to find without seeking emergency aid, and concealed himself and the evidence of his guilt after murdering her.

This case is on all fours with *Moye*, *supra*, 47 Cal.4th at pp. 553–554, and *People v. Nelson* (2016) 1 Cal.5th 513, 538–542. The defendant in *Moye* testified that he acted in self-defense. He had a sharp and clear recollection of the incident. "In short, the thrust of defendant's testimony below was self-defense—both reasonable self-defense (a complete defense to the criminal charges), and unreasonable or imperfect self-defense (a partial defense that reduces murder to manslaughter). There was insubstantial evidence at the close of the evidentiary phase to establish that the

defendant " 'actually, subjectively, kill[ed] under the heat of passion.' " (*Moye*, at p. 554.) The *Moye* court held that instruction on a sudden quarrel/heat of passion theory of voluntary manslaughter was not required. (*Id.* at p. 562.)

Similarly, in *Nelson*, the defendant told a forensic psychologist he shot the victims because he thought one was reaching for a gun, not because anger or rage flared up.

(*Nelson, supra*, 1 Cal.5th at pp. 540, 542.) In addition to the lack of affirmative evidence of a subjective overwhelming passion, the prosecution provided strong evidence of premeditation and deliberation. Neither the trial court nor the reviewing court found any evidence of the defendant acting without reason or judgment and no basis for an instruction on heat-of-passion voluntary manslaughter. (*Id.* at p. 540.)

The trial court was not required to instruct on heat of passion here. Orlop said that he stabbed Salisbury in justifiable self-defense, both the morning after the murder and at trial. There was no evidence that his reasoning or judgment were obscured by strong emotion or passion and no evidence supporting an instruction on voluntary manslaughter due to heat of passion. The trial court did not err.

The parties dispute the correct standard of harmless error. Finding no error whatsoever, we decline to settle their dispute.

2. Orlop Is Entitled to Credit for Days Actually Spent in Presentence Custody

Orlop contends, and respondent agrees, that he is entitled to credit for the number of actual days he spent in custody before the execution of his sentence on December 8, 2017.²

A defendant is entitled to credit for actual time spent in custody pursuant to section 2900.5, subdivision (a). Orlop was not entitled to any conduct credit because he

² The trial court imposed sentence on October 13, 2017, but delayed execution of sentence to permit defense counsel to file motions to strike Orlop's prior conviction and for new trial. Orlop's motions were denied and his sentence was executed on December 8, 2017.

was convicted of murder. (§ 2933.2.) The trial court awarded no custody credits at all "because of the nature of the case." It was correct not to award conduct credits but error not to award any actual custody credits. Orlop should not have been deprived of credit for the actual days he spent in custody before his sentence was executed. The parties agree that Orlop was in actual custody for a total of 1,021 days before his sentence was executed. The abstract of judgment must be corrected on remand.

DISPOSITION

We direct the court on remand to amend the abstract of judgment to add 1,021 days of presentence custody credit and to forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, we affirm the judgment.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

DATO, J.